

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1267-CR

Cir. Ct. No. 2013CF242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDY J. PARISI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Andy J. Parisi appeals from a judgment convicting him of possession of narcotic drugs. He contends that the circuit court erred in denying his motion to suppress evidence obtained from a warrantless blood draw. We disagree and affirm.

¶2 On October 16, 2012, police were called to a residence in Oshkosh to attend to an individual that was possibly not breathing. Upon arrival, they found Parisi lying motionless and unresponsive in the living room with vomit on the floor and sofa near him. Eventually, paramedics were able to revive Parisi with Narcan, a substance used to reverse the effects of opiate overdoses.

¶3 After Parisi was revived, he was transported by ambulance to Aurora Medical Center. Officer Benjamin Fenhouse followed the ambulance to the hospital. There, he instructed the medical staff to obtain a blood sample from Parisi. At no point did Fenhouse apply for a warrant. The sample, when tested, indicated the presence of opiates and morphine (a metabolite of heroin). This finding was consistent with the discovery of heroin at the residence where Parisi was found.

¶4 Parisi filed a motion to suppress the evidence obtained from the warrantless blood draw on the ground that it was unconstitutional. The State responded by arguing that the dissipation of heroin in Parisi's bloodstream constituted an exigent circumstance justifying the action. Following a hearing on the matter, the circuit court denied the motion. Parisi pled no contest and now appeals.

¶5 Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." A warrantless search is presumptively unreasonable and is constitutional only if it falls under one of the recognized exceptions to the warrant requirement. *State v. Tullberg*, 2014 WI 134, ¶30, __ Wis. 2d __, __ N.W.2d __.

¶6 One recognized exception to the warrant requirement is a search based on exigent circumstances. *State v. Faust*, 2004 WI 99, ¶11, 274 Wis. 2d 183, 682 N.W.2d 371. Exigent circumstances are present where there is a threat that evidence will be destroyed if time is taken to obtain a warrant. *Id.*

¶7 In reviewing a circuit court's decision on a motion to suppress, we apply the clearly erroneous standard to the court's findings of fact. *State v. Guard*, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718 (2011). However, we review de novo the court's application of constitutional principles to those findings. *Id.*

¶8 On appeal, Parisi renews his argument that his warrantless blood draw was unconstitutional. He maintains that the evidence obtained from it should have been suppressed because there were no exigent circumstances, police had time to obtain a warrant, and the search was unreasonable. We disagree.

¶9 On the day that police ordered the warrantless blood draw of Parisi, *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), *abrogated by Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013), was the law of this state. In that case, the Wisconsin Supreme Court held that the dissipation of alcohol in a person's bloodstream, alone, constituted an exigent circumstance justifying a warrantless blood draw. *Id.* at 547.

¶10 Given this precedent, police could have reasonably concluded that the dissipation of controlled drugs in Parisi's blood stream, alone, constituted an exigent circumstance justifying a warrantless blood draw. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) at 226, 228 & n. 132 (5th ed. 2012) (noting that the clear majority of

jurisdictions addressing the issue make no distinction between the metabolization of alcohol and controlled drugs) (citation omitted).¹

¶11 Although *Bohling* has since been abrogated by the United States Supreme Court,² it does not follow that evidence obtained in conformity with it should now be suppressed. Indeed, the Wisconsin Supreme Court has recently held that the good faith exception precludes application of the exclusionary rule where police searched a suspect's blood without a warrant in objectively reasonable reliance on *Bohling*. See *State v. Kennedy*, 2014 WI 132, __ Wis. 2d __, __ N.W.2d __; *State v. Foster*, 2014 WI 131, __ Wis. 2d __, __ N.W.2d __.

¶12 Because there is no legal difference between drawing blood to test it for alcohol or controlled drugs, see LFAVE, §5.3(c) at 226, 228 & n. 132, *Kennedy* and *Foster* are controlling precedent applicable to this case. Thus, regardless of whether the warrantless blood draw of Parisi may or may not have been retroactively unlawful under new United States Supreme Court precedent, the good faith exception precludes application of the exclusionary rule to exclude the evidence obtained. Accordingly, we are satisfied that the circuit court properly denied Parisi's motion to suppress.

By the Court.—Judgment affirmed.

¹ At the suppression hearing, the circuit court found that heroin dissipates quickly. Parisi does not argue that that finding is clearly erroneous.

² In *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552 (2013), the United States Supreme Court clarified that while the dissipation of alcohol in the bloodstream may support a finding of exigent circumstances in a specific case, “it does not do so categorically.” *Id.* at 1563. Instead, courts must analyze the totality of the circumstances to determine whether exigent circumstances exist. See *id.*

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

